vss

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3349 OF 1998

Girija Pandey
residing at 504, Tower No.1
Saket, Thane (W) ... Petitioner

V/s.

1. Surya Educational Society & Ors. ... Respondents

Mr.Susheel Mahadeshwar for Petitioner
Ms.Gauri Godse for Respondent Nos.1, 2 & 3

CORAM: **SMT.NISHITA MHATRE, J.**

DATED: **SEPTEMBER 27, 2007**

ORAL JUDGMENT:

. The Petitioner challenges the order of the School Tribunal dated 18.12.1996. By this order, the School Tribunal has dismissed the appeal both on the grounds of limitation and on merits.

2. The case of the petitioner is that she was appointed as an Assistant Teacher in the primary section of the school but no appointment order was issued to her. The petitioner claims that her services were terminated on 15.6.1992 orally by the respondents. An appeal was filed by her on 17.7.1992 contending that her services had been illegally terminated by the respondents. In her appeal, the petitioner had stated that she was appointed to the school on a clear permanent vacancy. She has stated that she was paid a

salary of Rs.300/- per month. According to the petitioner, she was suffering from jaundice from 14.12.1991. She had submitted medical certificates on 31.1.1992, 5.3.1992 by registered A.D. which were received by the management. A fitness certificate was submitted on 21.5.1992. When the petitioner reported for duty on 15.6.1992, she was handed over an experience certificate and was informed that she was no longer required in service. The appellant has tried to explain the delay caused in filing the appeal by stating that she had approached the Deputy Director of Education in July 1992, before filing the appeal. According to her, the delay in preferring the appeal was nominal and, therefore, the Tribunal ought to have condoned the delay.

3. In their written statement, the respondent Nos.1 to 3 had contended that the petitioner was appointed as a teacher in the secondary section on a temporary basis. She was also required to work in the primary section whenever no teacher was available in that section. The respondents have also pleaded that the petitioner had abandoned her services on 14.12.1991 and in fact her experience certificate which was written out by her husband indicates that she had left the services of the respondents from 30.4.1992. The respondents have stated in their written statement that they called upon the

petitioner by their letters dated 27.2.1992, 6.1.1992 and 27.1.1992 to report for work. These letters were sent under certificate of posting. According to the respondents, the petitioner continued to remain absent without intimating them the reason for her absence. The petitioner's services came to an end, according to the respondents, because she abandoned her services. The respondents have however admitted receiving the medical certificates dated 5.2.1992 and 29.1.1992 indicating that the petitioner was suffering from jaundice.

4. Admittedly, no documents were produced on record by the respondents to indicate that the petitioner has been appointed in a temporary vacancy and not a clear permanent vacancy as alleged in the appeal. The respondents have admittedly not issued any appointment letter to the petitioner. The only reason advanced by the respondents for not issuing such a letter is that the petitioner was a temporary employee and was required to work as and when work was available.

5. The School Tribunal has found that the petitioner had not explained the delay in filing the appeal sufficiently and, therefore, held that the delay could not be condoned. However, the Tribunal has dealt with the case on merits as well. The Tribunal has held that the petitioner was a temporary employee and that

she had abandoned her service with the respondent. The Tribunal has based its findings or the fact that the petitioner had obtained an experience certificate on 30.4.1992 indicating she was no longer in service from that date. According to the Tribunal, therefore, the period of limitation would run from 14.12.1991 when she stopped reported for work. The Tribunal has also held even if one considers the date of cessation of employment to be 30.4.1992, i.e. the date of the experience certificate, it would indicate that the petitioner had not satisfactorily explained the delay from that date till the filing of the appeal on 15.7.1992. The Tribunal was not impressed by the Petitioner's contention that she was seeking redressal of her grievance with the Deputy Education Officer and held that the appeal is barred by limitation.

5. The learned Advocate appearing for the petitioner submits that the petitioner admittedly was working from 12.6.1989 till 14.12.1991. He submits that the petitioner has averred in her appeal that she was appointed against a clear permanent vacancy and that is the only requirement of section 5 of the MEPS Act under which all appointments made to fill a permanent vacancy are to be considered to be on probation for two years. Under section 5(2), a probationer who has been in continuous service for two years is deemed to be

permanent. The learned advocate submits that once the petitioner is a permanent employee because of the deeming provision contained in section 5(2), the management could not have presumed that she had abandoned her service within a period of six months of absence. He points out Rule 16(3) of the MEPS Rules under which it can be presumed that an employee has abandoned his service if he is absent for more than three years. The learned advocate submits that the Tribunal has erred in not condoning the delay in approaching the School Tribunal. He relies on the judgments of this Court in *Maria Z. Concescio v/s. The Principal,* **1994 II CLR 984** and *Narendra Keshav Mahajan v. The Secretary, Private Education Society Khasbag, Kolhapur & Ors.*, **1993 II CLR 419** in support of his contention that the delay of a very limited period ought to be condoned. As regards the letters issued by the management to the petitioner under certificate of posting the learned advocate points out the judgment of the Supreme Court in the case of *Shiv Kumar & Ors. v/s. State of Haryana & Ors.*, **1994 II LLN 425** where the Supreme Court has observed that it would not be safe to decide the controversy before it on the basis of the certificates of posting produced before it as "it is not difficult to get such postal seals at any point of time". According to the learned advocate, the letters have not been received by the petitioner and no reliance

can be placed on such letters which were sent under certificate of posting.

6. A perusal of the order of the School Tribunal indicates that the delay has not been condoned by the Tribunal on the ground that there is no explanation for not filing the appeal within 30 days after the experience certificate was issued on 30.4.1992. The Tribunal has observed that except a copy of the letter dated 6.7.1992 addressed to the Director of Education, the petitioner had not produced any evidence to indicate that she was pursuing her remedy before the Education Officer. In my view, this observation of the Tribunal that the petitioner had not satisfactorily explained the delay is incorrect. Assuming that there has been a delay, the delay would be according to the Tribunal from 1.6.1992 till the filing of the appeal on 17.7.1992 which would be approximately 1.1/2 months. In the case of *Maria Z. Concescio v/s. The Principal (supra),* the Division Bench has observed thus:

> 3. ... In our judgment, taking into consideration of the fact that the petitioner was an Assistant Teacher, the Presiding Officer should have exercised the jurisdiction to condone the delay by taking lenient view. It is advisable that the party should have a feeling that the grievance is considered and not thrown out on technicalities. In these circumstances, in our judgment, it is necessary to set aside the order passed by the Presiding Officer and remit the proceeding back to the School Tribunal

for deciding the appeal on merits."

7. The delay in that case before the Division bench was of more than six months and the Court has condoned the delay. In the case of *Narendra Keshav Mahajan (supra)* also, the Division Bench has observed that when steps are taken to seek a remedy elsewhere and there is a delay in filing an appeal under the MEPS Act, generally such a delay should be condoned. In the present case, I am of the view that the Tribunal has erred in not condoning the delay. The delay is only of 1.1/2 months. There is an explanation advanced by the petitioner that she was seeking redressal of her grievance before the Education Officer. In this view of the matter, the delay ought to have been condoned.

8. On merits, in my view, the Tribunal has erred completely. There is a contention in the appeal that the Petitioner had worked from 12.6.1989 to 14.6.1991, when she fell ill. This has not been denied by the management. However, according to the management, the appointment was only on a temporary basis. The petitioner in her appeal has contended specifically that she was appointed against the clear permanent vacancy. There is no denial that in the written statement that such a permanent vacancy existed. The management ought to have produced evidence on record to indicate that the

appointment was temporary and not against a permanent clear vacancy. No such evidence has admittedly been produced before the Tribunal. Therefore, the Tribunal was in error in concluding that the appointment was not against a clear permanent vacancy.

9. Admittedly, the petitioner worked for more than two years on the clear permanent vacancy i.e. from 12.6.1989 to 14.6.1991. Therefore, in view of section 5(2) r/w 5(3) of the MEPS Act, she is deemed to have been made permanent after two years. In such circumstances, the management could not have assumed that she abandoned her service without waiting for three years as required under Rule 16(3) of the MEPS Rules. Thus, the presumed abandonment of service by the petitioner on and from 14.12.1991 is incorrect.

10. In the result, the petition succeeds. Rule made absolute. No order as to costs.